No. 75-1415

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1975

CHARLES ELLINGTON MCGUIRE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,

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OPINIONS BELOW

The memorandum order of the district court is not reported. The court of appeals affirmed without opinion (Pet. App. A).

JURISDICTION

The judgment of the court of appeals was entered on January 21, 1976. A petition for rehearing was denied on March 9, 1976. The petition for a writ of certiorari was filed on April 7, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether there was probable cause for petitioner's arrest and the ensuing search of the vehicle in which he was apprehended.

2. Whether in sentencing petitioner the district court improperly relied on a prior unlawful arrest and a prior conviction that was constitutionally infirm.

STATEMENT

Following a non-jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted of possession of marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1).[1] He was committed to the custody of the Attorney General for treatment and supervision pursuant to 18 U.S.C. 5010(b) of the Federal Youth Corrections Act, to be followed by two years' special parole. The court of appeals affirmed without opinion (Pet. App. A).

The evidence adduced at the suppression hearing[2] showed that agents of the Drug Enforcement Administration were advised by a confidential informant, who previously had supplied them with reliable information, that a large quantity of marijuana was to be smuggled into the United States on a certain night at a particular location on the Mexican border (Tr. 14-16, 21-23, 34, 38, 51). Government agents established surveillance at the location. They thereafter heard voices and sounds indicating that sacks were being dragged along the ground (Tr. 69); saw a pickup truck enter the area with its lights off; and heard sounds indicating that the tailgate of the truck was lowered and that soft, heavy objects were loaded into the bed of the truck (Tr. 51, 53, 59, 61).

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[1]Co-defendant William Head also was convicted on this charge.

[2]The case was submitted to the court on the evidence adduced at the hearing on the motion to suppress and on a stipulation that a Drug Enforcement Administration chemist would testify that the substance seized was marijuana (Tr. 99-103). "Tr." refers to the hearing on the motion to suppress.

When the truck departed, the agents followed it and thereafter stopped it. As they approached the truck, they observed burlap bags loaded inside it. Petitioner, the passenger, was found in possession of a semiautomatic pistol. Petitioner and co-defendant Head, the driver, thereupon were arrested and advised of their rights. A search of the truck uncovered another pistol in the door pocket on the driver's side. The burlap bags were found to contain more than 800 pounds of marijuana in brick-like packages (Tr. 16-19).

ARGUMENT

1. Contrary to petitioner's contention, his arrest and the subsequent warrantless search of the truck were based upon probable cause to believe that petitioner was engaged in the distribution of marijuana.

The reliable informant's information—that a quantity of marijuana would be smuggled into the United States at a particular time and place—was corroborated by the appearance of the truck, and sounds indicating that heavy sacks were being loaded into it. Prior to arresting petitioner, the agents also saw large burlap bags in plain view in the bed of the truck. "And surely, with every other bit of [the informant's] information being thus personally verified, [the agents] had 'reasonable grounds' to believe that the remaining unverified bit [that petitioner was in possession of marijuana] was likewise true." *Draper* v. *United States*, 358 U.S. 307, 313. Cf. *United States* v. *Harris*, 403 U.S. 573, 581. The arrest therefore was lawful, and the subsequent warrantless search was proper under the automobile search exception to the warrant requirement. *Chambers* v. *Maroney*, 399 U.S. 42; *Carroll* v. *United States*, 267 U.S. 132.

2. Petitioner contends that in determining sentence the district court improperly considered a prior state con-

viction for possession of a controlled substance, in which petitioner's guilty plea allegedly was involuntary. At the hearing on petitioner's "Motion to Supplement the Record on Appeal," however, petitioner advised the district court that he had in fact illegally possessed a controlled substance which formed the basis of his prior conviction (H. 38-39).[3] Accordingly, the sentence was founded not upon misinformation of constitutional magnitude (*United States* v. *Tucker*, 404 U.S. 443, 447), but upon petitioner's admitted past conduct. See *United States* v. *Atkins*, 480 F.2d 1223 (C.A. 9).

Petitioner also contends that in determining sentence the district court improperly considered his prior arrest for transporting marijuana, which petitioner contends was unlawful. There was no finding, however, that the prior arrest was unlawful.[4] In any event, in determining sentence the district court has discretion to consider a prior arrest that reflects past conduct, notwithstanding that the arrest may have been unlawful. *United States* v. *Schipani*, 435 F.2d 26 (C.A. 2), certiorari denied, 401 U.S. 983; *United States* v. *Vandemark*, 522 F.2d 1019

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[3]The trial court sentenced petitioner on July 23, 1975. Petitioner subsequently filed a "Motion to Supplement the Record on Appeal," claiming, *inter alia*, that the pre-sentence report included erroneous information. On September 12, 1975, the court held a hearing on the motion, at which petitioner presented several witnesses. At the conclusion of the hearing, the court declined to change the sentence and fully explained its reasons for the sentence imposed (H. 59-61). "H." refers to the transcript of proceedings of the hearing on September 12.

[4]We have been informed by the Clerk of the District Court for the Southern District of Texas, Corpus Christi Division, that petitioner has been convicted by a jury on a charge arising from this arrest, and that petitioner's motion to suppress the evidence seized, on the ground that the arrest was unlawful, was denied. That conviction is now pending on appeal.

(C.A. 9); *United States* v. *Lee*, C.A. 4, No. 75-1068, decided May 17, 1976.[5]

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

RICHARD L. THORNBURGH,
Assistant Attorney General.

JULY 1976.

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[5]There is no suggestion here that the prior arrest was made in bad faith. Petitioner's reliance (Pet. 19) on *Verdugo* v. *United States*, 402 F.2d 599 (C.A. 9), therefore is misplaced, since that holding rested upon an express finding that the police conducted the search in order to enhance the defendant's sentence. *Id.* at 612-613.